SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/06/2002 CLERK OF THE COURT
FORM V000A

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

CV 2002-012597

FILED: _____

KATHLEEN SHOLLY JAMES M FLENNER

v.

TPS-RABIDEAU INC ROBERT E MELTON

PHX JUSTICE CT-NW
REMAND DESK CV-CCC

MINUTE ENTRY

This court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of oral argument and the Court has reviewed the memoranda submitted by the parties, and the record from the Northwest Justice Court.

1. Factual and Legal Background

The parties entered into an 18-month rental agreement beginning July 1, 1997 to December 31, 1998 and a subsequent 18 month renewal agreement from January 1, 1999 to June 30, 2000. After the lease expired, the parties continued the tenancy on a month to month basis. Ms. Sholly, the appellee, moved out of the apartment in July 2000, after one month of the month to month rental.

This dispute arose over the return of the security deposit.

In May 2000, Ms. Sholly tendered the required sixty days notice to her landlord that she would terminate her tenancy. However, it appears that Ms. Sholly stayed an extra month and paid rent on a month to month basis. On July 30, 2002, Ms. Sholly vacated the premises, returned the keys, and tendered a letter requesting that her security deposit be returned to an address she provided in the letter.

On August 25, 2000, Ms. Sholly filed an action in the Northwest Phoenix Justice Court for the return of her security deposit and statutory damages claiming that the defendant/appellant failed to return her security deposit within the time mandated by the Arizona Landlord Tenant Act. Defendant/Appellant filed a counterclaim arguing that the plaintiff damaged the premises beyond normal wear and tear and is liable for the repair costs.

Between October 24, 2000 and July 2, 2001, the parties filed a series of Motions and counterclaims. On April 16, 2001, the defendant filed a Disclosure statement and Plaintiff's statement followed on July 2, 2001.

On April 4, 2002, the trial was held in the Northwest Phoenix Justice Court and a judgment was entered on April 24, 2002, for "Defendant on counterclaim - Ms. Sholly for $811.00", however, Ms. Sholly was the plaintiff. On May 14, 2002, the Justice Court issued an amended judgment for "Plaintiff/counter-defendant Ms. Sholly" for the amount of $811.00 with no explanation. From that decision Appellant filed this timely appeal.

Appellant raises four issues on appeal. First, the Appellant argues that the trial court erred in failing to enforce a valid arbitration clause that required the parties to arbitrate this matter prior to trial. Second, the Appellant claims that the trial court erred in its time calculation in applying the fourteen (14) day time period contained in A.R.S. § 33-1321. Third, the Appellant argues that the trial court erred in granting relief to the plaintiff that was not requested in the complaint and by issuing a new judgment without notice to the parties. Fourth, the Appellant argues that the trial court erred in admitting hearsay evidence.

2. Standard of Review

Appellant challenges the sufficiency of the evidence to support the judgment. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to

determine if it would reach the same conclusion as the original trier of fact.[1] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[2] If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict against the Appellant.[3] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[4] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[5] The Arizona Supreme Court has explained in *State v. Tison*[6] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[7]

[1] State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v.Brown, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v.* Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).
[2] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[3] *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[4] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[5] Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).
[6] Tison, 129 Ariz. at 546.
[7] Id. at 553, 633 P.2d at 362.

3. Discussion

A. Arbitration

First, the appellant argues that the trial court erred in failing to enforce a valid arbitration clause in denying Appellant's motion to compel arbitration. Here, the Appellant argues that the parties have agreed to arbitration based on the residential rental agreement signed by both.[8] Moreover, the Appellant further argues that under A.R.S. Section 12-501 a written agreement to arbitrate is valid, enforceable and irrevocable between the parties.[9] The Appellant further claims that under A.R.S. section 12-502 upon showing of an agreement to arbitrate the court was required to order the parties to proceed with arbitration. In response, the Appellee argues that Appellant waived his rights to arbitration by aggressive litigation of the case before raising arbitration as an issue.

Here, the trial court did not explain its reason for denying TPS/Rapideau's application for arbitration. However, I must affirm the trial court's decision if it is correct for any reason.[10] Arizona law favors arbitration, both statutorily and by the courts as matter of public policy, [11] although this court, like others, believe it is more accurate to say that the law favors arbitration of disputes that the parties have agreed to arbitrate. Given such public policy, the denial of a motion to compel arbitration is substantively appealable.[12]

As this court looks to the law it is clear that arbitration is the preferred method to resolve a dispute if the parties have an agreement to do so. A.R.S. Section 12-1502(A) provides in relevant part that:

> …the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party.

[8] Defendant's Exhibit 1, paragraph 3.
[9] Appellant memoranda p. 6
[10] Gary Outdoor Advertising Co. v. Sun Lodge, Inc., 133 Ariz. 240, 650 P.2d 1222 (1982*);* Rancho Pescado v. Northwestern Mutual Life Ins. Co., 140 Ariz. 174, 181, 680 P.2d 1235, 1242.

[12] Ariz. Rev. Stat. § 12-2101.01(A)(1).

The right to arbitration can be waived. A party can waive his/her right to arbitration by failing to perfect an interlocutory appeal[13] or by showing any conduct inconsistent with the arbitration remedy.[14]

The two relevant issues here is whether the opposing party has denied the existence of an arbitration agreement and whether the Appellant waived or abandoned his right to arbitrate. First, the Appellee has not denied the existence that an agreement to arbitrate exists. As for the second part, the issue is whether the Appellant waived or abandoned his right to arbitration. I answer this question in the affirmative.

Here, Appellant made its request to arbitrate more than twelve months after this case was in process. A series of motions, claims, counterclaims, and a settlement conference had taken place before the Appellant raised the issue of arbitration. Although a party does not waive his right to arbitration by merely filing a lawsuit,[15] seeking redress through the courts, especially to the extent the Appellant has, in lieu of arbitration, while asking for the same relief generally waives the right to arbitration.[16] Although the Appellant did not raise the issue of arbitration for over twelve months, the length of time a party waits before moving for arbitration may not always lead to a finding that he waived the right to arbitration.[17] In this case, the Appellant answered the opposing party upon the merits, filed a counterclaim, responded to Motions, participated in settlement hearings, and filed notice of depositions. These procedural moves took at least a year and it put both parties through considerable expense, which could have been avoided if the issue of arbitration was raised timely. I find that Appellant waived his right to arbitration.

B. Calculation of fourteen day time period

Second, the Appellant argues that the trial court erred in its calculation in applying the fourteen- (14) day time period contained in AR.S. Section 33-1321. Appellant is correct that under the Residential Landlord Tenant Act, specifically, A.R.S. section 33-1321(D), it requires that termination of the tenancy, delivery of possession and demand by the tenant will begin the fourteen day period. Here, on July 30, 2000, Appellee terminated her tenancy, delivered possession and made her demand for return of the security deposit. Given that July 30, 2002, was

[13] Rancho Pescado, 140 Ariz. at 174.
[14] Shahan v. Staley, 188 Ariz. 74, 932 P.2d 1345; Bolo Corp. v. Homes & Son Const. Co., 105 Ariz. 343, 464 P.2d 788.
[15] Meineke v. Twin City Ins. Co., 181 Ariz. 576, 892 P.2d 1365 .
[16] Bolo Corp, 105 Ariz. at 347.
[17] Shahan v. Staley, 188 Ariz. at 74.

a Sunday, and § 33-1321(D), unambiguously states that the fourteen days does not include "…Saturdays, Sundays or other legal holidays…" the demand therefore did not take effect until Monday, July 31, 2002, and the fourteen days terminated on August 17, 2000, and the landlord was required to either return the entire security deposit or "…provide the tenant an itemized list of all deductions together with the amount due and payable to the tenant…."[18] That did not happen.

Appellant argues the month to month tenancy ended at 12:00 am on August 1, 2000. This argument is not persuasive. Appellant cites to Thomson v. Gin[19], which is not relevant law for residential landlord tenant issues.. Thomson discusses the Mobile Home Parks Residential Landlord and Tenant Act. Since the legislature thought it wise to have a separate act for Residential and Mobile Homes, the Residential Landlord Tenant Act is controlling law for this issue. Within the A.R.S. § 33-1321 it does not provide a time to determine the tenancy's ending, and this court is not inclined to artificially create one.

On August 23, 2002, the Appellee received a letter and check dated August 18, 2002, and an accounting of the deductions. The Appellant mailed the letter to the incorrect address, which caused the letter to be returned. After the letter was returned the Appellant mailed it to the address provided for in writing by Ms. Sholly as required under A.R.S. § 33-1321(D). A.R.S. § 33-1321(D) in pertinent part provides that "…Unless other arrangements are made in writing by the tenant, the landlord shall mail, by regular mail, to the tenant's last known place of residence." Here, other arrangements were made and Appellant refused to abide by the Appellee's request. It's failure to do so resulted in the accounting and return of security deposit. Therefore, Appellant did not comply with § 33-1321 and I affirm the trial court's decision that the deposit was mailed after the required statutory time.

C. Relief granted and new judgment

As to the Appellant's third issue that the trial court erred in granting relief to the Plaintiff that was not requested in the complaint and by issuing a new judgment without notice to the parties. These are two separate issues and shall be addressed as such. First, the Appellant claims the trial court erred by granting relief that was not requested. In order to undertake an analysis of the claim this court needs factual and legal support from the Appellant. Here, the Appellant provides no legal support that modifying an award based on evidence is contrary to law. The

[18] A.R.S. Section 33-1321(D).
[19] 27 Ariz. App. 463, 556 P.2d 17 (Ariz. App. Div. 2).

Appellee requested that her entire deposit be returned. It is plausible that after consideration of the evidence put forth at trial, the trial court determined that the Appellee was not entitled to the full amount of her security deposit. It is also plausible that based on fairness the trial court reduced the amount of the request. What is clear, is that the trial court determined that the part of the Appellee's security deposit was wrongfully withheld. Although the plaintiff requested the total amount of the deposit be returned, the trial court was well within its power to modify the award after consideration of the evidence. Clearly, the trial court also determined that some of the repairs were necessary. The trial court determined that the amount the Appellee was due should be mitigated by repairs done to the property.

As to the second part of issue, Appellant argues that the trial court erred by issuing a new judgment without notice to the parties. It is clear that under Arizona Rules of Civil Procedure, Rule 60(a) that a court "…at any time of its own initiative or on motion of any party…" may correct "…clerical mistakes in judgments, orders or other parts of the record…." The only change was the correction of the name of the party who received a judgment. The amount remained the same. The court made a clerical mistake and on its own initiative the trial court immediately corrected it. The trial court acted properly.

D. Inadmissible evidence

Appellant's fourth claim is that the trial court erred in admitting inadmissible evidence at trial. The Appellant argues that a multi-list service sheet (MLS) and testimony concerning that document at trial was inadmissible. The Appellant requests reversal since it cannot be determined that the admission of the document was harmless. It does appear that the document was hearsay.

However, this Court's analysis is not complete without considering whether the error could be considered harmless error. The Arizona Supreme Court has previously defined fundamental error as an error that "reaches the foundation of the case or takes from the parties a right essential to a defense, or is an error of such dimensions that it cannot be said it is possible for a party to have had a fair trial."[20] "And, where there is substantial evidence in the record which will support the verdict and it can be said that the error did not contribute significantly to the verdict, beyond a reasonable doubt, reversal is not required."[21] The record in this case

[20] State v. King, 158 Ariz. 419, 424, 763 P.2d, 239, 244 (1988).
[21] State v. Gallegos, 178 Ariz. 1, 11, 870 P.2d 1097, 1107, cert.denied, 115 S.Ct. 330, 513 U.S. 934, 130 L.Ed.2d 289, appeal after remand, 185 Ariz. 340, 916 P.2d 1056, cert.denied 117 S.Ct. 489, 519 U.S. 996, 136 L.Ed.2d 382(1994), citing State v. Thomas, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981).

contains strong evidence from which this Court concludes that the failure of the trial court to deny the admission of the multi-listing evidence did not significantly contribute to judgment.

3. Conclusion

Based upon these facts, there was sufficient evidence for the trial court to deny the Appellant's motion to compel arbitration. There was also sufficient evidence to find that the Appellant did not comply with A.R.S. § 33-1321(D) when he failed to return the security deposit within the required statutory time. Additionally, I find that the trial court did not err by correcting a mistake in the judgment. The admission of the multi-listing into evidence was harmless error.

IT IS THEREFORE ORDERED affirming the judgment of the Northwest Phoenix Justice Court.

IT IS FURTHER ORDERED remanding this matter back to the Northwest Phoenix Justice Court for all further and future proceedings.